IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1411

ST. LOUIS BOARD OF EDUCATION,
Petitioner,

v.

EARLINE CALDWELL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,
Respondents,

CRATON LIDDELL, et al.,
Respondents.

BRIEF FOR EARLINE CALDWELL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit of December 13, 1976, is reported at 546 F.2d 768. Its clarifying order of January 17, 1977, is not yet reported. The Consent Judgment and Decree of the District Court of December 24, 1975 (A. 7) and the District Court's order of January 23, 1976 (A. 12) denying respondents' motion to intervene are not reported.

Jurisdiction

The Court of Appeals' judgment reversing and remanding the case to the District Court was entered on December 13, 1976. On January 17, 1977, the Court of Appeals denied petitions for rehearing en banc and, treating them as petitions for rehearing, denied petitions for rehearing. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Whether the Court of Appeals erred in holding that respondents, Earline Caldwell, the St. Louis Branch of the NAACP, et al., were entitled to intervene as of right in accordance with Rule 24(a)(2) of the Federal Rules of Civil Procedure.

Constitutional and Procedural Provisions

The following constitutional and procedural provisions are pertinent to the present petition for writ of certiorari:*

1. The Fourteenth Amendment to the United States Constitution: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Rule 24(a)(2) of the Federal Rules of Civil Procedure:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or the transaction

* See also Rule 23(d)-(e) quoted below.

> which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Statement of the Case

The respondents see the present case quite differently from the way in which it is presented in the petition for writ of certiorari. As we see matters, the only issue decided by the Court of Appeals for the Eighth Circuit, and thus the only issue appropriate for this Court's review at the present time, was whether the present respondents were entitled to intervene in an on-going school-desegregation case. That issue arose in the manner described below.

The school-desegregation case was commenced on February 18, 1972, by black parents of minor school children attending school in the St. Louis, Missouri, public school system. Plaintiffs' request that the action be designated as a class action was denied on May 25, 1973. The district court reconsidered this decision and designated the action as a class action under Rule 23(a) and 23(b)(2) on October 3, 1973. Notice of the order was directed to be published and interested parties were invited to seek intervention by December 1, 1973. Substantial pretrial discovery took place prior to the class-action designation and discovery was continuing.

On June 7, 1974, the parties entered into and filed a stipulation of fact "[i]n order to expedite the disposition by the Court of this cause, in the interest of judicial economy and to reduce the burdens upon all parties of

a lengthy and complex trial, concerning a period of about twenty years."

The event triggering the present respondents' motion to intervene came on December 24, 1975. On that day the district court entered an order styled, "Consent Judgment and Decree." The Consent Judgment and Decree adopted the stipulation of facts and also made the following statement:

> Nothing herein contained shall be deemed to be an admission on the part of the defendants that the charges contained in plaintiffs' Complaint, as amended, are true. However, notwithstanding the actions taken by the Board subsequent to *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts.

This statement and the stipulation form the predicate for the following general obligation imposed by the Consent Judgment and Decree:

> Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

The only specific remedial provisions giving content to this general obligation are as follows:

(1) A phased-in program of majority-to-minority transfers of teachers to achieve a 10 per cent minimum ratio of minority-race teachers in each school in 1976, a 20 per cent minimum in 1977, and a 30 per cent minimum by the 1978-1979 school year.

(2) New schools were to be located in accordance with an "objective of eradicating the effects of past and present segregation in the public schools."

(3) A study was to be made by the school board of the feasibility of integrating high schools by realignment of elementary school feeder patterns.

(4) A study was to be made of the feasibility of establishing "magnet" elementary and high schools and curriculum changes "with the goal of desegregating the school system."

The agreed-upon Consent Judgment and Decree provided that reasonable attorneys fees and expenses for counsel for the plaintiffs were allowed against the Board of Education in St. Louis.

Finally, the district court retained jurisdiction.

Simultaneously with the entry of the Consent Judgment and Decree, the district court ordered that notice of the judgment be published advising all members of the plaintiffs' class and other interested parties that they could file objections to the judgment and that a hearing on any such objections would be held on January 23, 1976. Six black pupils, through their parents and next friends, and the NAACP through its St. Louis Branch—the respondents here—filed objections and a motion to intervene. On January 23, 1976, by written order, the district court "denied"

respondents' objections to the remedial portions of the decree and denied the motion to intervene.

Respondents, at that point proposed-intervenors, took a timely appeal, presenting to the Court of Appeals the question whether they were entitled to intervene as a matter of right and asking the Court of Appeals to review as well the Consent Judgment and Decree and their objections to it. (Petitioners insisted below, and prevailed on the question, that the Court of Appeals could not review the merits of the decree.) The Court of Appeals was at pains to declare that the merits of the decree were not before it, that the only question to be decided was the issue of intervention. The Court of Appeals said:

> The only issue before us concerns the right of the appellants-petitioners to intervene. (A. 16)
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> • • •
>
> As we stated earlier, we do not believe that the merits of the consent decree are before us . . . . (A. 23)
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> • • •
>
> The only issue decided by this court, as specifically recited in the court's opinion filed December 13, 1976, related to the district court's order denying the petition for intervention. (A. 29)
>
> • • •
>
> The merits of the consent decree were not before this court. (A. 29)

The Court of Appeals reversed the district court, holding that the present respondents were entitled to intervene of right and remanded the case for further proceedings. Motions for rehearing en banc and for stays of the mandate were denied both by the Court of Appeals and by this Court; and the present petition for writ of certiorari followed.

Reasons for Denying the Writ

1. A fair reading of the Court of Appeals opinion indicates that that Court acted with the utmost restraint in the face of a request (by the present respondents) to review a remedially deficient decree in a school-desegregation action. That Court repeatedly stated that the merits of the decree were not properly before it because all parties conceded that the order was interlocutory in scope and because the record was deficient on whether alternative plans had been considered. The Court did indicate that, if the ultimate desegregation plan adopted provided no stronger remedy than the Consent Judgment and Decree, it would fall short of the plans approved by other Courts of Appeals in contemporaneous and similar litigation (A. 24-25, n.11). The Court also suggested that the district court might find it helpful to invite the intervention of the United States through the Department of Justice and the Missouri State Board of Education. The Court also noted that the district court might consider means of seeking the voluntary cooperation of St. Louis County in assisting in desegregation of the city school system. It is these suggestions, and mainly the first regarding the ultimate plan to be adopted, that form the foundation of the petition for writ of certiorari. The Court of Appeals did not, as the petition asserts, "promulgate" any "requirements," except to say that a remedy should be implemented by the commencement of the 1977-1978 school year and to state that, in the meantime, the Consent Judgment and Decree is still obligatory on the parties. The Court of Appeals simply did not do what the petition for writ of certiorari claims: It did not undertake to require a remedy in conflict with this Court's decisions. It did not undertake to establish racial quotas. The circumlocutions of the petition itself confess as much when the petition asks this Court's deci-

sion on whether the Court of Appeals erred in "intimating" that the Consent Judgment and Decree might not pass constitutional muster as a final plan and in "purportedly directing" adoption of racial quotas. The obvious reasons that it cannot be said that these matters formed a "holding" of the Court of Appeals is that they did not. As we read the Court of Appeals' opinion, its main underlying idea was a desire to provide some help to the district court in guiding this already long-delayed litigation to a close.

2. The only issue decided by the Court of Appeals and, therefore, open to review upon this petition is whether the present respondents were entitled to intervene during the remedial stage of this litigation following upon a doubtful, although interlocutory, compromise agreed to by the designated representatives of the respondents' class. In our view, the Court of Appeals' decision on this question (treated as subsidiary and secondary in the petition for writ of certiorari) was correct. The governing principles are stated in Rule 24(a) of the Federal Rules of Civil Procedure:

> Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It has not been disputed, either here or below, that the respondents not only claimed but possessed and continue to possess an interest in the transaction which is the subject of the action and that the respondents' ability to protect that interest may be practically impaired by the disposition of this action. The question becomes, then, whether

the motion to intervene was timely and whether intervention is barred by adequate representation.

A. *The Application to Intervene Was Timely.* The petition relies upon this Court's decision in *NAACP* v. *New York*, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973), for the proposition that the application to intervene in the present case was untimely. In our view, this reliance is misplaced (the only similarity between the cases being the identity of one of the applicant-intervenors).

First, in *NAACP* v. *New York* it became obvious from the time of the Government's answer that there was a strong likelihood of the Government's consenting to entry of summary judgment. In the present time, until the intervenors were notified of entry of the Consent Judgment and Decree, it was not obvious that there was any likelihood that the certified class representatives would consent to entry of any judgment, much less a decree of minimal remedy.

Second, the intervenors in *NAACP* v. *New York* failed to take steps to protect their interest at the stage where it became obvious that their interests might be adversely affected and, thus, at the stage at which affirmative protective steps became incumbent upon them. Here, in contrast, the motion to intervene followed immediately upon notice by the court of the first step in what could prove to be a progressive settlement of the constitutional claims of the plaintiffs' class. The intervention came at exactly the first stage critical to protecting the intervenors' interest, namely, when its protection otherwise came to be in doubt.

Third, the intervenors' participation was invited by the district court. Following entry of the Consent Judgment and Decree, the district court directed publishing the judgment and advising members of the plaintiffs' class of a right to file objections. See Rule 23(d), F.R.C.P. Partici-

pation was sought in response to the court's directive in the form most likely to be capable of affirmatively protecting plaintiffs' interests, namely, intervention. See Rule 23(d), F.R.C.P. Had intervention been forgone at that point, then *NAACP* v. *New York* would be relevant to whether intervention was later barred by untimeliness; indeed, the rule of *NAACP* v. *New York* suggests that respondents might be required to intervene of right or else risk losing that opportunity by sleeping on the right. Cf. *United States* v. *Carroll County Board of Education*, 427 F.2d 141 (5th Cir. 1970) (motion to intervene six months after entry of judicially approved school-desegregation plan, with acceptance of both parties, was untimely).

Fourth, the Consent Judgment and Decree embodies on its face a continuing, on-going, phased-in, step-by-step remedy; it reflects the court's and the parties' understanding of the appropriateness, if not necessity, of future modifications, additions, and supplementation. The intervention came at the first stage of a process of studying, considering, and ultimately adopting a final remedy; it did not come after final judgment, and it did not seek to upset what had gone before.

Fifth, the terms of the Consent Judgment and Decree represent as modest a proposal for remedying *de jure* segregation as might be supposed. The Consent Judgment and Decree provides only for limited transfer of personnel and no provision beyond studies for pupil reassignment; the decree makes no provision at all for any effort to desegregate elementary schools but includes only limited opportunity for desegregation of a few schools by a provision for studying the magnet-school form of freedom of choice. The terms of the Consent Judgment and Decree also suggest, therefore, the appropriateness of future modification and, thus, the timeliness of the application to intervene at the commencement of the remedial stage.

Sixth, to the extent that the minimal, first-step remedy embodied in the decree is inconsistent with this Court's abandonment of the doctrine of all deliberate speed, see *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970); *Alexander* v. *Holmes County Board of Education*, 396 U.S. 1, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969), the intervenors' motion—coming just at the time when a minimal, first-step remedy is consented to—is necessarily timely.

Seventh, no party could be prejudiced by permitting intervention to determine the constitutional adequacy of the relief accepted by representatives of the plaintiffs' class or to discover whether the defendants, in their effort to fulfill their constitutional obligation, may have not yet reached the mark.

Finally, intervention at this time is fully consistent with the rules governing class actions. Rule 23(d) of the Federal Rules of Civil Procedure provides that

> [i]n the conduct of actions to which this rule applies, the court may make appropriate orders: . . . requiring, for the protection of the members of the class or otherwise for the fair conduct to the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .

This rule expressly recognizes the necessity in some cases for members of an already-represented class to intervene, and intervention is clearly not limited to the commence-

ment of the action.* The rule contemplates that intervention might well be triggered by a district court's notification of developments pending or occurring in the class action. Indeed, Rule 23(e) casts some doubt on whether the district court's approval of the Consent Judgment and Decree could have become effective until after notification to the intervenors:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

B. *Intervention Is Not Barred by Adequate Representation.* Rule 24(a) provides that *"anyone shall be permitted to intervene"* (upon a showing of an interest and some likelihood of impairment) *"unless* the applicant's interest is adequately represented by existing parties." What is at stake in this case is whether the constitutional adequacy of the interim remedy embodied in the consent decree can ever be tested in open litigation.

The test of adequacy of representation, as stated by this Court, is whether "there is sufficient doubt about the adequacy of representation to warrant intervention": "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528, 538 & n.10, 92 S.Ct. 630, 30 L.Ed. 2d 686 (1972). At the very least, a looming and substan-

* This Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129, 87 S. Ct. 932, 17 L. Ed. 814 (1967), suggests that it could not be so limited consistently with Rule 24(a)(2).

tial doubt has been raised as to the adequacy of the representation of the intervenors' interest by the designated representative in this case. Adequacy of representation is called into question by (1) acceptance of a general and otherwise minimal remedy (2) to be phased-in overtime (3) 23 years after *Brown,* and after four years of litigation (4) while forgoing the right to litigate openly the constitutional permissibility and adequacy of the remedy. The intervenors, members of the plaintiff-class and respondents in this Court, simply claim their right to litigate those questions.

This Court spoke in the pre-*Brown* university cases of the "personal" constitutional right claimed. This Court declared in one such case that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws . . . ." *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351, 59 S.Ct. 232, 83 L.Ed. 209 (1938). See *Sweatt* v. *Painter,* 339 U.S. 629, 70 S.Ct. 898, 94 L.Ed. 1114 (1950). *Brown II* referred to "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." *Brown* v. *Bd. of Ed.,* 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955). This personal, constitutional right is the "interest relating to . . . the transaction which is the subject matter of the action" claimed by the intervenor pursuant to the purposes of Rule 24(a)(2). It is the same interest as to which, it is apparently conceded, the respondents' ability to protect it may be impaired or impeded by the disposition of this action, absent their intervention. The question which will be brought forward in the courts below, by the respondents and on behalf of the plaintiff-class as well as themselves, is the content of that right. For a time after *Brown* this right was confined to allowing black students to main-

tain class actions to obtain, not their own transfer to white schools, but rather declaratory judgments tracking the language of *Brown I* and general injunctions against racial discrimination. See *Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963); *Covington* v. *Edwards*, 264 F.2d 780, 783 (4th Cir. 1959), *cert. denied*, 361 U.S. 840, 80 S.Ct. 78, 4 L.Ed.2d 79 (1959); *Holland* v. *Board of Public Instruction*, 258 F.2d 730, 733 (5th Cir. 1958). It was limited, in other words, to approximately what was accepted on behalf of the respondents' class in the district court. We believe that we, who have an interest in the transaction of the litigation, whose ability to protect it may be impaired, whose interest is a personal, constitutional right, and who are members of the class sought to be bound, are entitled to intervene to litigate our claim.

To be sure, it has never been held that any individual public-school student has a personal right to attend any particular school or any school with a particular racial mix. But it is clear that every student—including the respondents here—has a present and personal right to attend school in a system organized and operated in conformity to the Constitution. If a serious claim be made of a "condition that offends the Constitution" in a school system's current operation, see *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), then the claimant ought to be entitled to intervene in any proceeding in which a compromised remedy has created, perpetuated, or condoned that condition.* This

* In the Fifth Circuit it is the general policy of the Court of Appeals to *require* intervention by those who, like the respondents here, question the remedy in school-desegregation cases. See *Hines* v. *Rapides Parish School Board*, 479 F.2d 762 (5th Cir. 1973):

> [T]he proper and orderly procedure to be followed by third parties in seeking to question deficencies in the implementation of desegregation orders or for further relief in ongoing school cases is by petition to intervene.

See also *Lee* v. *Macon County Board of Education*, 482 F.2d 1253 (5th Cir. 1973); *Calhoun* v. *Cook*, 487 F.2d 680 (5th Cir. 1973); *Davis* v. *Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975).

Court's thought (although from another context) is apt: "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, *the benefits of which every person may demand. Hill* v. *Texas*, 316 U.S. 400, 406, 62 S.Ct. 1159, 86 L.Ed. 1559 (1912).

The Court of Appeals decision, here brought on for review, seems to reflect a concern to be of help to the district court and a conviction that the intervenors (as well as others suggested by the Court of Appeals) can provide useful assistance. No school-desegregation case can be regarded as closed until "school authorities . . . have achieved full compliance with this Court's decision in *Brown I*" and the system is then "'unitary' in the sense required by [this Court's] decisions in *Green* and *Alexander*." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 31. Our motion to intervene—in full compliance with Rule 24(a)(2) and in fulfillment of the policies of Rule 23(d)-(e)*—promises to assist in seeing that day.

* Professor Moore takes the position that Rule 23(d)(3) enables intervention quite apart from Rule 24. He states the view that, while a legitimate determination that a class is adequately represented may preclude intervention under Rule 24(a), such a determination would not preclude intervention under Rule 23(d)(3) "to improve representation of the class." J. Moore, 3B Moore's Federal Practice para. 23.90[1] n.13 (1977). While other authorities may disagree, see C. Wright & A. Miller, 7A Federal Practice and Procedure § 1799, p. 254 (1972), the authorities are together in insisting that intervention in class actions is to liberally allowed.

3. The petition for writ of certiorari makes much of the following statement in the opinion of the Court of Appeals: "The parties were faced with an admittedly *de jure* segregated school system. . . ." (A. 20) It is claimed that this sentence is contradictory to the following statement in the Consent Judgment and Decree: "Nothing herein contained shall be deemed to be an admission on the part of the defendants that the charges contained in plaintiffs' Complaint, as amended, are true." (A. 7-8) This latter statement from the Consent Judgment and Decree must be read in conjunction with other portions of the decree:

> [N]otwithstanding the actions taken by the Board subsequent to *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts. (A. 8)

The Consent Judgment and Decree also recognizes an obligation to pursue an objective "of eradicating the effects of past and present segregation in the public schools of the City of St. Louis," (A. 9) of "eliminating or reducing segregation," (A. 9) and of "reducing racial isolation in the schools . . . with the goal of desegregating the school system." (A. 10) Taking these statements together

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The overall effect of the 1966 amendments to Rules 23 and 24 is to grant the (b)(1) and (b)(2) class member a more liberal right to intervene in the original class action.

J. Moore, *supra* at para. 23.90[2], p. 23-1627.

> Intervention under Rule 23 is intended to insure that every class member is given an opportunity to be heard. . . . It should be liberally allowed in order to insure the objectives outlined above.

C. Wright & A. Miller, *supra* at § 1799, pp. 253, 254.

there would appear to be nothing inconsistent in the proposition that, while the defendants admit nothing, the court has found *de jure* segregation.

Perhaps more importantly, the Consent Judgment and Decree imposed upon the petitioners the following general obligation:

> Defendants, their agents, officers, employees and successors, and all those in active concern and participation with them shall be enjoined and prohibited from discrmination on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth. (A. 8)

The predicate for this general remedial obligation must be that the school system is *de jure* segregated within the governing constitutional principles. The equitable remedy of injunction cannot be predicated on an unsubstantiated presumption that one affected by the decree has engaged or will engage in wrongdoing. See *Hicks* v. *Miranda,* 422 U.S. 332, 348-51, 95 S.Ct. 2281, 95 L.Ed.2d 223 (1975); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 604 608-09, 95 S.Ct. 1200, 43 L.Ed.2d 448 (1975). Cf. *Hicks* v. *Miranda, supra* at 357 (Stewart, *J.,* dissenting). The Consent Judgment and Decree, which the petitioners seek to sustain, must carry with it an agreement, made law by the entry of that agreement as the judgment of the court, that *some* remedy is warranted, and the question remaining is what remedy.

In any event, and even conceding the doubtful claim that the petitioners' self-created ambiguity provides a litigable issue, petitioners are asserting their argument in the wrong court. The issue presented by this petition is, not whether one statement in the Court of Appeals' opinion and one statement in petitioner's agreed-upon Consent Judgment and Decree are inconsistent, but instead whether the Court of Appeals erred in holding that respondents were entitled to intervene as a matter of right. To the extent that the petitioners' Consent Judgment and Decree is ambiguous on whether a factual predicate for *any* remedy exists, that issue can be litigated (or settled by agreement) in the district court. In fact, it seems impossible to imagine why it was not. After leading this litigation for four years, one would be remiss in his obligation to the class he represents to fail to provide the predicate necessary to *any* equitable relief. To the extent, therefore, that petitioners' argument is credited, it suggests that the Court of Appeals would have fallen into patent error had it held that respondents were not entitled to intervene as a matter of right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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